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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

Nos. 71 and 73

FEDERAL POWER COMMISSION, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY, and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 71
CITY OF COLTON, CALIFORNIA, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY, and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 73

BRIEF FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RICHARD E. TUTTLE,
Chief Counsel,
J. THOMASON PHELPS,
Principal Counsel,
MARY MORAN PAJALICH,
Principal Counsel,
5072 State Building,
San Francisco 2, California.

BERNARD-WALEN PRINTING CO., SAN FRANCISCO

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BRIEF FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

QUESTIONS PRESENTED

While petitioner Federal Power Commission (FPC) and City of Colton (Colton) have each presented a

single question for review, as in their petitions for writ of certiorari, they have not set forth all the questions involved. They are as follows:

1. Does the record support FPC's finding that there is some out-of-state energy in the sale made at wholesale by Southern California Edison Company (Edison) to Colton? This basic jurisdictional issue of fact was reserved by the Court below, which for the purpose of its decision assumed that it was determined in favor of FPC and Colton. (310 F.2d 784, 786, footnote 2; R. 940.)

2. Is FPC's jurisdiction over Edison's sale to Colton at resale precluded by Section 6 of the Boulder Canyon Project Act of 1928, which confers jurisdiction on the Secretary of the Interior, in the absence of state regulation, over rates for the sale of electric energy originating at power installations constructed under that Act? This issue also was reserved by the Court below, which assumed for the purpose of its decision that it was determined in favor of FPC and Colton. (310 F.2d 784, 786, footnote 2; R. 940.)

3. Has FPC jurisdiction under Section 201(a) and (b) of the Federal Power Act where, as the lower Court said, "the original sale for interstate transmission is under federal control and no other state is affected in any way by [California's] regulation of the subsequent transaction."? (310 F.2d 784, 794; R. 951.)

4. Has FPC jurisdiction of sales at wholesale in interstate commerce made wholly from nonjurisdic-

tional (i.e., exempt from FPC jurisdiction) local distribution facilities? This question was not passed upon by the Court of Appeals for the Ninth Circuit.

A finding adverse to petitioners on any one of these four questions is sufficient to sustain the judgment of the Court below.

Additional questions, though not finally determinative of regulatory jurisdiction, were raised below but did not have to be decided by the Court of Appeals. They would have to be considered only if the judgment below were to be set aside.

STATEMENT

The following statement is made to correct inaccuracies and omissions in the briefs of petitioners (Rule 40(3)):

1. FPC and Colton erroneously state that Edison obtains energy from Davis Dam in Nevada. Edison has obtained no energy from Davis since April 30, 1956 (R. 61-62), a date which precedes FPC's decision determining jurisdiction by more than five years. Even prior to 1956 the record shows only infrequent instances of nominal deliveries into Edison's system. (R. 40.)

2. FPC embodies in its statement (p. 4) a recital of its own finding that there was a third route by which out-of-state energy could reach Colton, but failed to disclose that there is no testimony in the

record that Colton ever received any energy over the so-called third route.[1]

In footnote 2 (p. 4) FPC discloses the mootness of that finding in that that route has been disconnected since January 7, 1961. (R. 884.)

3. While FPC has gone out of its way to advert to matters outside of the record allegedly having occurred subsequent to submission, it has gone only part of the way and has failed to advise the Court that matters which also have arisen since the decision have made FPC's assertion of jurisdiction altogether moot. The Metropolitan Water District (MWD) now requires its entire entitlement from Hoover for its own use; therefore it has no "unused" energy to turn back to the United States for sale to Edison, but instead requires large amounts of supplemental energy from Edison to meet its requirements. This reversal of the flow of energy precludes receipt by Edison of Hoover energy at Hayfield for the foreseeable future, barring emergency or disaster conditions. (R. 883-4.) (Infra, p. 12, footnote 3.)

4. Petitioners have not advised the Court that the uncontradicted evidence shows that Edison serves no customers outside of California and contains no showing of sales to companies which sell to customers outside of California, any implications in footnote 18, FPC brief, page 33, to the contrary notwithstanding.

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[1]The so-called third route was from Hoover Dam (which spans the Colorado River between Nevada and Arizona) to Chino, Edison's substation in California, thence to Edison's Highgrove substation in California.

SUMMARY OF ARGUMENT

1. The record contains no substantial evidence of any interstate energy in Edison's sale to Colton for resale. It is not enough that there is a modicum of energy in the Edison system which is sold to Edison by the United States Government at Hoover Dam; FPC's jurisdiction over a sale for resale depends upon substantial proof that there is *such energy* in that sale for resale. (Federal Power Act, §201(b) (Appendix, p. i.) Mere speculation as to the possibility of its presence in the sale is not substantial evidence.

2. The provisions of the Boulder Canyon Project Act (45 Stat. 1057-1061; 43 U.S.C. §617 preclude FPC jurisdiction, inasmuch as that act confers jurisdiction upon the Secretary of the Interior for the subsequent sale of energy generated at Hoover Dam, in the absence of state regulation. The act was not repealed by the later enactment of the Federal Power Act; on the contrary, amendments made in 1940 and in 1954 (Act of May 28, 1954, C. 241, 68 Stat. 143) evidence the continued intent of Congress to maintain the administration of the Boulder Canyon Project Acts in the Secretary of the Interior. To avoid duplication, California has adopted the argument on this subject made by Edison in its brief.

3. The decision of the Ninth Circuit reaches the result which is consistent with the words of the Federal Power Act and is in accord with the intent of Congress.

In granting FPC jurisdiction over sales at wholesale in interstate commerce (Sec. 201(b) Federal Power Act) Congress did not extend jurisdiction to *all* of such sales. The section must be read in conjunction with Sec. 205(a) (Appendix, p. iii) by which Congress gave FPC rate jurisdiction for the sale of only such energy as was subject to its jurisdiction, with Section 201(b) which gives FPC no jurisdiction over local distribution facilities, and with the declaration of Congressional intent in Section 201(a) (Appendix, p. i) that FPC's regulation should extend "only to matters not subject to regulation by the States."

The legislative history clearly shows that it was the intent of Congress to give FPC only enough jurisdiction to fill the "Attleboro gap." (*Public Util. Comm. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).) In that case the Court found that the interstate electric business carried on between two companies in two different States was not local to either, was essentially national in character, and not subject to regulation by either State.

In the Senate Committee Report we read that the policy of the revised bill was:

> ". . . to extend that [federal] regulation to those matters which cannot be regulated by the states and to assist the states in the exercise of their regulatory powers, but not to impair or diminish the powers of any State Commission." S. Rep. No. 621, 74th Cong., 1st Sess. 48.

Elsewhere in the same report we read:

> "The revision has also removed every encroachment upon the authority of the states. * * * The rate-making powers of the Commission are confined to *those* wholesale transactions which the Supreme Court held in Public Utilities Commission v. Attleboro Steam & Electric Co. (273 U.S. 83) to be beyond the reach of the states." (Emphasis added.) S.Rep.No. 621, 74th Cong., 1st Sess. 18, 48 (1935). See also H.R.Rep. No. 1318, 74th Cong., 1st Sess. (1935).

Since the record establishes the absence of any national interest in Edison's sale to Colton for resale (assuming, *arguendo*, that there had been substantial proof of interstate energy in such sale) and since only the State of California has any interest in such sale, it could have constitutionally regulated the sale at the time of the passage of the Federal Power Act and therefore still can do so.

4. When a sale in interstate commerce for resale has been initially regulated by an appropriate federal agency, subsequent sales of that energy within the state for ultimate consumption within the state present no conflict of state interests and concern only the local interest of the state of ultimate consumption.

As the Court said in *Connecticut Light & Power v. FPC*, 324 U.S. 515, 524 (1944):

> "Here, however, the Federal authority to fix the sale price of the energy coming from Massachusetts in interstate commerce attaches and presumably has been or at least may be exercised . . .

before the energy reaches this [the local reselling] company. What petitioner [in the same position as Edison here] does or fails to do is only after the incidence of Federal regulation and can in no way frustrate it."

5. The decision of the Court below provides a certain and workable basis for both federal and state jurisdictions and provides the wise accommodation of the interests of both that should prevail under our form of government. To hold that FPC has jurisdiction over such sales as those in the case at bar because of a possible remote or indirect interest of customers in other States would have an immediate, direct and upsetting impact on rates of all customers in California and would frustrate the long-standing economic policy of the State to keep rates to municipalities for resale as low as possible without burdening other customers, both resale and "retail."

6. Finally, the cases relied upon by petitioners are distinguishable in that they either involve conflicts of interest between the States or are factually at variance with the case at bar. In either event, sweeping statements therein construing the intent of Congress can scarcely be said to be persuasive now. The Court has held that the purpose of Congress in passing both the Natural Gas Act and the Federal Power Act was to close the "Attleboro gap." Since Congress clarified the Natural Gas Act by the Hinshaw Amendment (15 U.S.C. Section 717(c) (1954) (Appendix, p. iv)), affirming its intent to leave to the states jurisdiction of companies engaged in distribution of

natural gas, whose operations take place in a single state and which can be completely regulated by that state, California respectfully submits that decisions prior to the clarification of intent should be reevaluated with a view toward determining their applicability to the instant case. Even if not conclusive, subsequent legislation defining the intent of an earlier law is entitled to great weight when it comes to the problem of construction. (*FHA v. The Darlington,* 358 U.S. 84 (1958).)

ARGUMENT

I.

THE RECORD CONTAINS NO SUBSTANTIAL EVIDENCE THAT THERE IS ANY INTERSTATE ENERGY IN EDISON'S SALES TO COLTON FOR RESALE.

FPC says "If this were a case under the Sherman Act, a mere recital of the *facts which were assumed* in this case would surely suffice." (FPC Br. p. 31, emphasis supplied.) The italicized words are well chosen, for certainly they were assumed and not proved by FPC. California agrees that under the Sherman Act a continuous stream of goods moving from an out-of-state supplier to an in-state wholesaler *and thence to an in-state distributor* would provide the interstate commerce required by the Act. But here the analogy ends. Under the Federal Power Act only *those* interstate transactions where a multistate concern exists fall under FPC jurisdiction. (Sections 201(a) (Appendix, p. i), 201(b) (Appendix, p. i) and 205(a) (Appendix, p. iii).)

Thus proof of the jurisdictional character of the energy involved in a sale for resale must be proved by the proponents of the issue and cannot be assumed.

It is not enough for FPC to oust California of jurisdiction to show that there is some out-of-state energy in Edison's system and that Edison sells some energy for resale. These facts were freely admitted by Edison. The mere filing of Colton's complaint alleging on information and belief that some out-of-state energy was sold to it for resale, and the subsequent investigation by FPC's staff, give rise to no presumption of FPC jurisdiction. Absent reliable, probative and substantial evidence in the record of interstate energy in Edison's sales *to Colton,* FPC's assertion of jurisdiction is error.

This fundamental jurisdictional issue of fact was reserved by the Court below, which assumed only for the purpose of its decision that energy reached Colton from out of state. (310 F.2d 784, 786, footnote 2; R. 940.)

While the determinations of an administrative agency such as FPC are entitled to great weight if supported by substantial evidence, California also is an administrative agency whose statements herein, and testimony during the hearings before FPC, are based upon its *expertise* acquired in over half a century of regulation of public utilities.[2] From its van-

[2]California has regulated Edison's entire rate structure since 1911.

tage point of experience and standing among regulatory agencies, California respectfully submits that its assertions herein are entitled to *at least* as much weight as those of FPC. The record is devoid of reliable, probative and substantial proof that there is any interstate energy in Edison's sales to Colton.

FPC refers to three sources of out-of-state energy which "could reach Colton". (Br. p. 4.) They are (1) from Hoover Dam via Hayfield to Highgrove, "thence to Colton"; (2) from Hoover to Davis Dam, Arizona, to Hayfield and thence, as before, to Colton; and (3) from Hoover to Chino to Highgrove "and on to Colton." (Idem.)

1. As to the energy which is supposed to have come into the Edison system via the Chino line, there was no evidence in the record that Colton ever received any energy from this source, and no attempt to produce any such evidence by FPC, so it may be dismissed from consideration.

2. FPC refers to energy entering the Edison system via Davis Dam in Arizona. The record is explicit and uncontradicted that no energy has come into the Edison system from that source since April 30, 1956. (R. 61, 62.) Even prior to that date the evidence is uncontradicted that Edison received energy from that source only on rare occasions. (R. 40.)

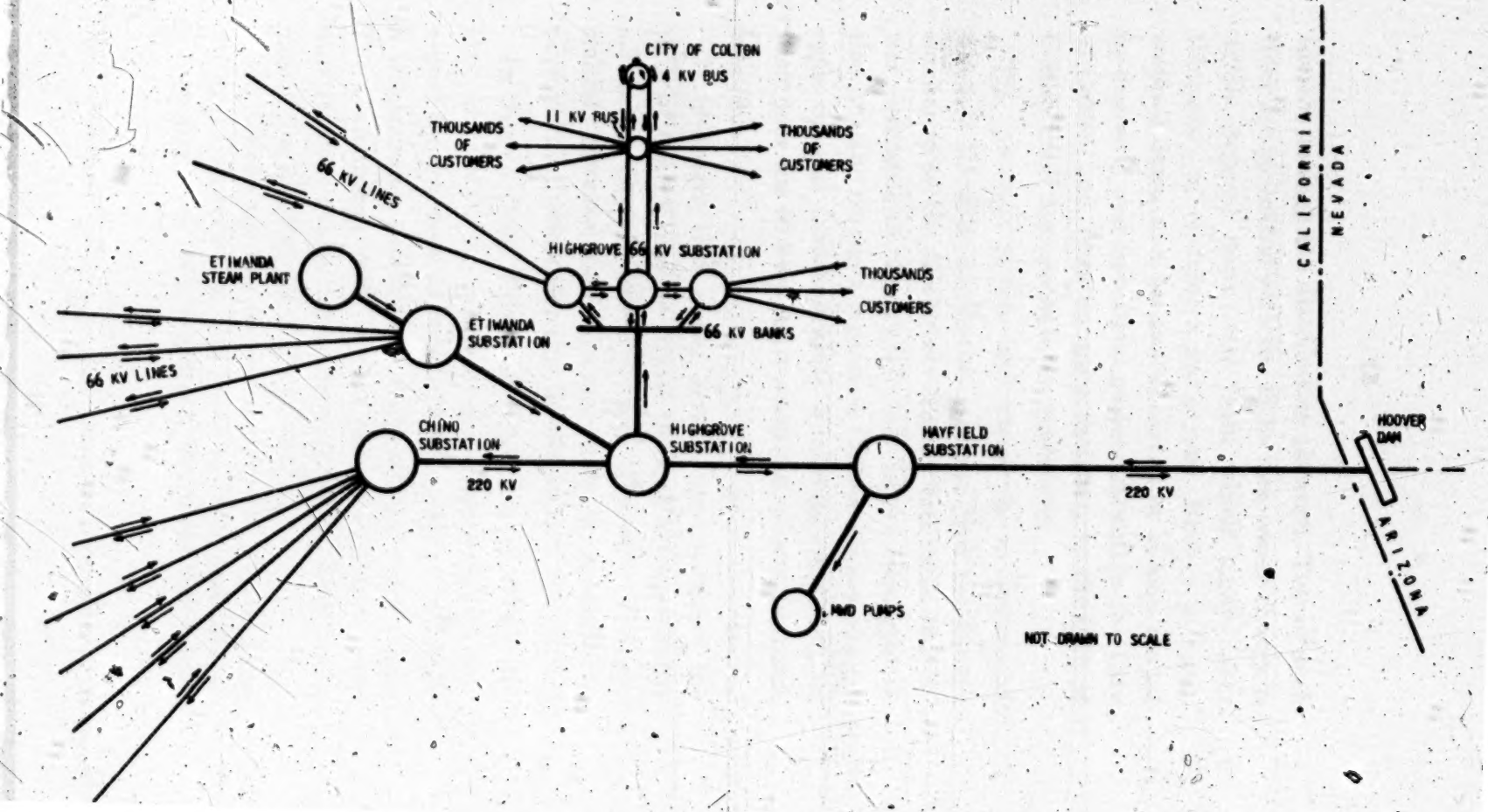
3. The only source of out-of-state energy upon which the FPC staff relied in its showing, from which it attempted to trace out-of-state energy "on to Colton," was the Hoover Dam energy which came into the

Edison system at Hayfield.[3] As to such energy, both Colton and FPC failed to sustain the burden of showing that such energy reached Colton.

A diagram is appended in order that the Court may more readily follow the argument on this point. It shows that the Highgrove 220 kv substation had three sources of electric energy available to it at all times. These are the transmission lines from Hoover Dam via Hayfield, from Edison's Etiwanda generating plant, and from Edison's Chino substation. Each of the three 220 kv transmission lines connected to the Highgrove 220 kv substation either supplied energy to or received energy from it, depending on the varying load and resource conditions that existed from time to time. Connected to the Highgrove 220 kv substation are the transformer banks which step down the voltage to 66 kv and the 66 kv substation from which emanate 66 kv lines. The latter, depending on system resources and loads, may carry energy to the 66 kv substation or from it to satisfy the requirements of thousands of cus-

[3]In 1958 the amount of out-of-state energy in Edison's system was about 6%. Of this, only about 1% was delivered over this Hayfield connection. (R. 316-317.) (Of all the energy on the Edison system, Colton in 1958 received 0.15%. (R. 318, 754).) In 1959 the percentage of out-of-state energy entering Edison's system at this Hayfield connection dropped to one-fifth of 1%. (R. 684.) This *de minimis* quantity would in itself tend to negate even the speculation that there is out-of-state energy in the sale to Colton. In *United States v. Public Util. Com.*, 345 U.S. 295 (1953) the Court considered the impossibility of separating interstate from intrastate energy consumed by each purchaser and said: "In such a case, federal rate jurisdiction must attach . . . irrespective of occasional and unpredictable use of nonjurisdictional intrastate power." The converse, then, must be equally valid irrespective of occasional and unpredictable and *de minimis* use of jurisdictional interstate power.

DIAGRAM OF FACILITIES CONNECTED WITH HIGHGROVE SUBSTATION



tomers through the distribution network. Two of such lines are connected with the 11 kv bus, where energy is again stepped down and from which many other thousands of customers are served. Energy is again stepped down to 4 kv and is served by a loop circuit to domestic and industrial customers within the City of Colton, and, from the same facilities, to the City of Colton itself for resale to its customers.

The problem before the Court is to determine whether there is substantial evidence that the energy coming in to the Highgrove 220 kv bus from Hoover was delivered to the transformer banks connected to that bus and thereafter reached Colton. If such energy were instead transmitted to Etiwanda or Chino, or went over the 66 kv lines it could not, of course, reach Colton.

It is known that under certain circumstances the path of energy may be traced through a transmission substation having several sources of supply. It is essential, however, that adequate data be available to permit valid conclusions to be drawn.

In *Jersey Cent. Power & Light Co. v. FPC*, 319 U.S. 61 (1943), the nature of the electric system presented the problem, as here, of tracing energy through a transmission substation having several connections. The Commission staff, in that case, was able to support its conclusions with adequate proof. The Court makes this clear at 319 U.S. 65-66:

> "Since the bus bar into which the Jersey Central energy is fed *also receives large amounts of energy from other sources,* the facts *heretofore*

detailed *do not prove conclusively* that energy generated by Jersey Central passes to and is consumed in New York. This *further* evidence appears from testimony presented by investigators of the Commission. Their examination of Public Service records discloses that *there were moments of time* between January 26, 1937, and September 6, 1938, *when all the energy* flowing into the bus bar at Mechanic Street *came from Jersey Central* and at the same moments energy flowed from Mechanic Street in New Jersey to the Atlantic Substation in New York. As no pools of energy exist from which the flow to New York could have been drawn, *it necessarily follows that Jersey Central production was instantaneously transmitted to New York.*" (Emphasis added.)

In the present case, however, the record contains no evidence comparable to that presented in *Jersey Central*. No evidence whatsoever was introduced that there were any moments of time when all the energy flowing into the bus at Highgrove Substation came from Hoover. The fact that, depending on the demands of the system, energy from that bus flowed to Chino or Etiwanda, was ignored. The fact that Chino and Etiwanda provided California "pools of energy from which the flow to [Colton] could have been drawn" was ignored. The fact that those sources were at all times more than adequate to supply Colton was ignored. The energy flows to and from the 66 kv substation were ignored. Nevertheless, FPC determined that any energy on the Hoover-Hayfield line was "necessarily supplying the requirements of the trans-

former banks" (R. 853) and only what was left over would go to other loads on the Highgrove bus.

To support its conclusion FPC relied, first, upon the relative position of the connections to the 220 kv bus at Highgrove Substation. To use this argument of relative position it has to be assumed that "electrical dimensions" exist between the connections and that a load draws first from the source which is "closest." Dr. Royal W. Sorensen, the world-renowned electrical engineer, stated unequivocally that such electrical dimensions do not exist. This opinion was neither challenged nor contradicted. (R. 136-137.)

As a hedge against the failure of its "dimensional" analysis argument FPC relied, secondly, upon the assumption that the energy from all available sources may mix and that a given load will be supplied with a pro-rata share of energy from all sources. By the use of such assumption FPC committed an error in logic. The determinative question is whether Colton receives energy from Hoover which is only one of several sources available. *The assumption that Colton receives energy from each available source necessarily includes an assumption that it receives energy from Hoover. FPC assumed the answer to the very point in issue.* It was for this reason that the correctness of such an assumption was flatly contradicted by Dr. Sorensen (R. 343, 398), and by the California Commission's engineer. (R. 688.)

The FPC engineer made no effort to justify his "tracing" on a scientific basis or to testify as to any assumptions, however unfounded, which he might

have made. The FPC staff, in arguing that out-of-state energy "may" reach Colton, relied merely upon the assertion that for convenience the mutually exclusive "mixing theory" or the "electrical dimensions theory" should be accepted regardless of their scientific merits. Apparently its argument was adopted by FPC on the premise that if you cannot prove something you should then make whatever assumptions are necessary to permit you to come to the conclusion you want to reach.

All that the record shows is connection with a source from which out-of-state energy might, out of the thousands of other possible paths, have gone "on to Colton."

Mere connection is not enough. (*Jersey Cent. Power & Light Co. v. FPC, supra.*) Mere suspicion, or speculation, is not enough. The record would equally support a finding that all the Hayfield energy went to Etiwanda or Chino, leaving none for the transformer banks, or that Etiwanda or Chino supplied all the requirements of the transformer banks. FPC in effect came up with the conclusion it wanted to reach, ignoring facts which would give equal support to inconsistent inferences. That this is arbitrary and a denial of due process needs no citation. FPC jurisdiction depends upon a showing that at least some of the energy in the resale sought to be regulated was transmitted from out of state. (Federal Power Act, Sec. 201(a), (b), (c) (Appendix, pp. i, ii).)

California has not suggested an argument which would lead to frustration of FPC jurisdiction. It is

not suggesting that FPC jurisdiction must always fail because of failure to make a scientific tracing. The fact is that in many factual situations the tracing can be affirmatively established on a scientific basis.[4] It is not difficult to establish the matter conclusively. All that needs be shown, as in *Jersey Central, supra*, is that other sources of supply are inadequate.

II

FPC'S JURISDICTION IS PRECLUDED BY SECTION 6 OF THE BOULDER CANYON PROJECT ACT OF 1928.

On this issue, to avoid repetition, California adopts the argument made by Edison in Nos. 71 and 73 in this Court.

III

THE FEDERAL POWER ACT WAS CORRECTLY CONSTRUED BY THE COURT BELOW.

The record before the Court is confined to a sale of energy from a single California utility company—Edison—from its local distribution facilities to a single California city—Colton—of energy assumed to have been sold to Edison by the United States and transmitted into California from Hoover Dam, which

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[4] "This bill [the Federal Power Act] came before Congress as prepared by the staff of the [Federal Power] Commission, couched largely in the technical language of the electric art. Federal jurisdiction was to follow the flow of electric energy, *an engineering and scientific*, rather than a legalistic or governmental test. *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529. (Emphasis supplied.)

is outside of the state; Colton is assumed to have resold "such energy" (Federal Power Act 201(a) (Appendix, p. i)) to its inhabitants. There is nothing in the record about operation of any power pools, nor is their any showing that Edison buys energy from or sells energy to companies which sell to customers outside of California. The record is uncontradicted that Edison does not sell to any customers outside of California. FPC in its brief has referred to matters which, not being of record, are improperly urged for the Court's consideration. (FPC Br. pp. 33-34, n. 18, pp. 36, 37.) California deplores the resulting necessity of replying in like manner.

In this portion of its argument, California will address itself solely to the correctness of the decision below. California respectfully asserts that the Court below correctly construed the Federal Power Act and that its decision should be affirmed because:

A. The decision below reaches the result which is consistent with the words of the Federal Power Act and is in accord with the intent of Congress.

B. The decision below provides a certain and workable basis for determining both FPC and State jurisdiction.

C. There are no controlling decisions which constitute a holding on the question and facts at issue here.

A. The Decision Below Reaches the Result Intended by Congress.

1. The History of the Federal Power Act Affirmatively Shows an Intent to Limit FPC Jurisdiction.

The provisions of Part II of the Federal Power Act were enacted only after a long series of Supreme Court decisions in which it was established that, absent federal statute, a state could constitutionally regulate interstate sales of energy provided such sales were a matter of essentially local as opposed to national interest. *Simpson v. Shepard,* 230 U.S. 352 (1913); *Mill Creek Coal & Coke Co. v. Public Serv. Comm'n.,* 100 S.E. 557 (1919); *Manufacturer's Light & Heat Co. v. Ott,* 215 Fed. 940 (1914); *Pennsylvania Gas Co. v. Public Serv. Comm'n.,* 252 U.S. 23 (1920); *Public Util. Comm'n. v. Landon,* 249 U.S. 236 (1919); *Missouri Ex rel. Barret v. Kansas Natural Gas Co.,* 265 U.S. 298 (1924). Those decisions established that the principal criterion of national interest is whether the interests of more than one state are involved. In line with this criterion it was held in *Public Util. Comm'n. v. Attleboro Steam & Elec. Co.,* 273 U.S. 83 (1927) that where a sale for wholesale in interstate commerce was involved *and* where the conflicting interests of two states were involved, regulation by either of the states was constitutionally proscribed. This was the Attleboro gap, and Part II of the Federal Power Act was enacted in 1935 to fill it, placing in the Federal Power Commission jurisdiction over such sales, but expressly preserving to states whatever jurisdiction they could

constitutionally exercise in the absence of federal statute.

The Congressional intent is set forth clearly in Section 201(a) of the Federal Power Act which provides:

> "It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to . . . that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*" (Emphasis added.)

(See also recitation of Congressional intent in *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 527 (1945); S. Rep. No. 651, 74th Cong., 1st Sess., p. 48.)

Since sales at wholesale in interstate commerce generally do involve the interests of more than one state and since for this very reason general language was employed in Section 201(b) giving FPC jurisdiction over "sales at wholesale in interstate commerce", it is easy to fall into the error of concluding that *all* sales at wholesale in interstate commerce involve the interests of more than one state, thereby precluding state jurisdiction, and that therefore all sales at wholesale in interstate commerce were intended by Congress to be placed under FPC's jurisdiction. If, however, we keep in mind the Congressional intent

and give effect to the express limitation in Section 201(a) preserving to the states whatever jurisdiction they could constitutionally have exercised before passage, it is always a pertinent inquiry, even where a sale at wholesale in interstate commerce is involved, to ask whether the particular sale is one where only one state can have an interest. If the answer is affirmative, that state constitutionally could have exercised jurisdiction prior to Part II of the Federal Power Act, and therefore by the express terms of Section 201(a) may exercise jurisdiction thereafter. In such a situation there is no Attleboro gap to be filled by Federal regulation and the states cannot be precluded from exercising their lawful authority over matters which are of concern only to their inhabitants.

The Edison-Colton sale is not within the Attleboro gap for still another reason; the prior, interstate sale by the United States to Edison is not regulated by the FPC. The Boulder Canyon Act vests jurisdiction over such sale in the Secretary of the Interior.

A careful reading of the legislative history of both the Natural Gas Act and the Federal Power Act discloses that the framers of the legislation were concerned over sales of gas by interstate pipeline companies to distributing companies; by sales of electric energy from a company operating in one State to a company operating in another; by abuses perpetrated by holding companies and by the possibility that intrastate rates might come under FPC regulation because they might be held to be a burden on interstate rates.

Nowhere do we find any discussion of need for bringing under FPC jurisdiction *all* wholesale sales in interstate commerce, or specifically of sales made from local distribution facilities for resale after initial regulation by the federal government. Mr. H. Lester Hooker, then Chairman of the Legislative Committee of the National Association of Railroad and Utilities Commissioners (NARUC), gave his understanding of regulation of wholesale sales in interstate commerce which if not shared by the proponents of the bill was not challenged by them. His statement is as follows:

> "These wholesale sales should be regulated, but, in striving to do this, bear in mind that the moment the energy crosses the boundary of a State line, *and is ready for distribution,* that moment State jurisdiction attaches, and each and every step thereafter is subject to strict and complete regulation and supervision." (Emphasis added.) (Hearings in H.R. 5423, 74th Cong., 1st Sess., 1935, p. 1614.)

Over and over again we find the voiced apprehension of the States through their representatives in NARUC that the area permitted to their regulation (i.e., the area in which there is no conflict of interest between the states—the local area) would be invaded by the proposed legislation.[5]

Indicative of the assurances given by proponents of the bill is the statement of Mr. Hooker (Hearings on H.R. 5423, 74th Cong., 1st Sess., 1935, p. 1611):

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[5]California has been advised that NARUC by motion to be concurrently filed herewith has asked for leave to join in California's brief *amicus curiae.*

> "It has been repeatedly stated; by all of the representatives of the proponents of this bill who have appeared before this committee, that the avowed purpose of this legislation is merely to 'supplement,' or to 'fill in a gap' in State regulation, and not to supplant, supersede, or duplicate the regulation within the power of the States in any respect. It has been stated time and again by the proponents that it is their desire to leave unaffected and unimpaired the entire field to the maximum extent to which the States may be able to deal with this matter."

The very language of the reports of the Senate Committee report set forth on pages 16 and 17 of FPC's brief shows the intent of Congress:

> "The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in Public Utilities Commission v. Attleboro Steam & Electric Co. (273 U.S. 83), to be beyond the reach of the States . . . ." (S. Rep. No. 621, 74th Cong., 1st Sess., pp. 17-47.)

The House Commerce Committee also referred to the Court's decision in Attleboro, and states that Part II [of the Act] gives FPC jurisdiction to regulate "these rates"—rates which because of conflict of interest between the states could not be regulated by them.

California respectfully submits that it ill becomes FPC now, in the face of all the assurances given when its own staff drew the bill, to impute to Congress any intent to do more than to fill the Attleboro gap.

California does not ask the Court to add to the scope of legislation, but rather, as Justice Frankfurter said in his dissent in *FHA v. The Darlington,* 358 U.S. 84, 92 (1958):

> "... imaginatively to extrapolate the contemporaneous answer that the Legislature would have given to an unconsidered question ...."

This may be done in the light of the Congressional intent as expressed contemporaneously, and reiterated in the Hinshaw Amendment, to fill the Attleboro gap and to do no more.

2. There Is No National Interest in Edison's Sales of Energy to Colton for Resale.

From the facts in this case it is very obvious that no state except California has any interest in Edison's rates to Colton, nor is there any showing in the record to the contrary. The declaration by FPC that the interests of Arizona and Nevada, as well as California, are affected (Br. p. 6 and footnote 5, p. 6), is error, as may be simply demonstrated. The footnote refers to the allotment of water between the three states as determined by the United States. The issue here is not whether more than one state has an interest in the allotments, but whether more than one state has an interest in the rates which Edison charges Colton. There is no relationship between the two; the government determines allotments of water upon considerations independent of what Edison charges Colton. Furthermore, the portions of the Hoover Power Plant assigned by the United States for the use of Arizona

and Nevada are separated both physically and electrically from those assigned to California.[6]

3. FPC's Claim of Jurisdiction Over All Sales for Resale Would Lead to an Absurd Result.

There are literally several hundred thousand sales for resale which come within the four corners of the definition of Section 201(d) (Appendix, p. ii) of a "sale of electric energy at wholesale." If FPC is to be given jurisdiction over all of these sales, its proper function of regulating matters of multi-state concern would be seriously impaired. It is well known that FPC's staff, even now, is overworked and undermanned. In California, as well as in other states, electric utilities sell energy from local distribution facilities through master meters to multiple dwelling units, office buildings, shopping centers, and even to trailer courts, which in turn resell such energy to their tenants. In California, the California Commission fixes rates for the energy sold by the electric utilities for resale.

FPC has never asserted any jurisdiction over such sales, though the sale to Colton for resale from local distribution facilities is just as "locally" oriented as they. Reasonable rates and adequate service go hand

[6]FPC was advised that this is the fact. (R. 876.) The record adverted to in footnote 18, FPC Br. p. 34, refers to a geographical map (Edison Ex. 12; R. 731, 198) which appears to show an interconnection. There is no such interconnection, as a schematic map would disclose. R. 725 (Edison Ex. 11, R. 725, 198) refers to a diagram which appears to show Hoover generators as a single unit numbered 1, 2, 3 and 4. The record clearly shows that Hoover Power Plant is operated as several separate generating units. (R. 223, 224.)

in hand. California fixes the one and assures the other. It would be an aspersion upon the good sense of the framers of the Federal Power Act to assume that they intended such resellers of energy or their tenants to abandon the local forum which is familiar with local problems and to incur the expense incident to invoking FPC jurisdiction, to say nothing of the additional time involved in awaiting its decisions.

B. The Decision Below Provides a Certain and Workable Basis for Determining Both FPC and State Jurisdiction.

1. The Decision Below Provides a Certain Basis.

FPC asks a number of questions in its brief which seem to afford it some difficulty. California can offer the answers.

a. It asks "how does one prove another state is affected?" (FPC Br. pp. 30-31.) Surely, it is difficult to prove something that does not exist. Once there has been a federally-regulated sale for resale of energy which is to be wholly consumed within one State, subsequent sales of that energy within the State of ultimate consumption would involve the interest of and affect only that State, as only California is affected by Edison's sales to Colton. If the facts are otherwise, proof would still be simple. For example, in *United States v. Public Util. Comm'n.*, 345 U.S. 295 (1953) there was a single, unbroken transmission of energy from place of sale in one state to place of receipt and resale in another; there more than one state was affected and FPC's rate jurisdiction had a certain basis.

b. FPC asks (p. 34) whether its jurisdiction depends upon whether the seller is making out-of-state sales, and if so, how many such sales suffice. The answer is simple enough—FPC has jurisdiction over each such sale, even if there is only one, provided it is a wholesale sale involving the interests of more than one state.

c. It asks (Br. p. 35) if federal jurisdiction, "once attached," depends upon the continuation of the out-of-state sales. California's answer is, of course it does, unless the discontinuance can be shown to be of such a temporary or seasonal[7] nature as to make a change in jurisdiction inadvisable. Jurisdiction cannot be said to attach itself like a leech irrespective of a change in the facts which gave rise to it.

d. FPC asks whether, if the seller has no out-of-state customers, federal jurisdiction may be based upon the "possible impact" of the in-state wholesale rate upon an out-of-state supplier. One may well ask, "What impact?" If the out-of-state supplier's rate is properly regulated by FPC or other federal agency, the impact is controlled and the in-state wholesale rate is therefore of no concern to the out-of-state supplier.

FPC sets up a number of hypothetical problems (Br. pp. 32-33), none of which even faintly resemble the facts before the Court, where there is no showing of any "impact." FPC worries for fear that an in-state seller who also makes sales to customers in other

[7] As in the "rise and fall of the Susquehanna River." *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 420 (1952).

states (not the case here) may charge an excessive rate to the in-state distributors,[8] which would cause "a contraction in the demand for the seller's power" among the distributors and "increase the proportion of the seller's power" among the distributors and "increase the proportion of the seller's system-wide costs which would be borne by out-of-state customers under rates subject to Power Commission jurisdiction." (FPC Br. pp. 32-33.) Proper allocation-of-cost principles by FPC in fixing rates for the out-of-state customers would preclude such a situation. Also, if a rate for an in-state wholesale sale is too low, there is no reason why FPC would have to fix a burdensome rate on the out-of-state wholesale customer in order to supply the deficiency in the in-state wholesale rate. If the in-state *retail* rates were too high or too low, by the same reasoning FPC would have to regulate them too.

California, in fixing intrastate rates, has often dealt with the reverse of FPC's hypothetical problem, holding that while it cannot regulate unduly low interstate rates it will not permit intrastate customers to be burdened thereby, and that the utility's remedy is to seek compensatory interstate rates.[9] California customers have not suffered any deterioration thereby in either quality or efficiency of service.

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[8] In California the electric utilities own and operate distribution *and* transmission facilities.

[9] *Re Southern Sierras Power Co.*, 39 Cal. P.U.C. 606, 613; 16 PUR (NS) 194, 201 (1937);
Re Sunland Tujunga Telephone Co., 57 Cal. P.U.C. 1, 4 (1959).

As California views it, the really upsetting impact is that which would result if FPC is held to have jurisdiction over Edison's sale to Colton for resale. California has had a long-standing policy of fixing rates for wholesale municipal purchasers at a figure which is as low as possible without unduly burdening other classes of customers.[10] If FPC's jurisdiction is established, it might fix a rate for Edison's sale to Colton which is too high or too low by comparison with rates charged other municipalities for intrastate service, thus frustrating the statewide economic policy.

The rate charged Colton has a direct and immediate impact upon the people of Colton, and, since Edison's system is considered by California as a whole in fixing both "retail" and "resale" rates, the rate to Colton has an impact on all of Edison's retail customers in California.[11] Even if one were to concede, *arguendo,* that some customers of other utilities in Nevada or Arizona might be affected by Edison's rate to Colton, their interest would be most indirect and remote. FPC tries to put the interest of a hypothetical customer in another State on a par with the immediate and direct

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[10]There has never been any contention by Colton or FPC that Edison's rate to Colton is unreasonable. Colton is concerned only with the level of the rate and not with its reasonableness. (See FPC Br. p. 7, footnote 7, Colton Br. pp. 3, 4, footnote 1.)

[11]In fixing rates California studies results of operation of Edison's system as a whole; if FPC were to have jurisdiction over resale rates, in order to fix "retail" rates California would still have to consider the system as a whole in order to assure that the "retail" customers were not unduly burdened by too-low FPC rates, thus necessitating that futility of duplication where only one State is affected which FPC so deplored at the time of the passage of the Hinshaw Amendment. (Infra, p. 41.)

interest of California consumers. Obviously, there is here no such paramount national interest in Edison's sale to Colton as to oust the state of its jurisdiction.

2. The Decision Below Provides a Workable Basis.

FPC argues that application of the standard of the decision below would present factual and legal questions of great complexity.

Let us examine the asserted difficulties of application. FPC would have the Court believe that the state regulatory agencies could not prescribe rates for in-state resales in the event Edison—or other electric utilities whose operations are not of record—should join an interstate power pool. This concept is based on the following premises (FPC Br. pp. 37-39):

a. Only FPC has a highly specialized staff.

b. Only FPC can compel production of books and records of all members of the pool.

c. The states in regulating in-state sales for resale cannot rely upon FPC's adequacy in fixing cost estimates in the "first sale", "i.e., the interchanges of power among the [pool] members themselves" because operations of a pool are fluid and costs fluctuate.

d. Some states do not regulate sales for resale.

e. California's—and Edison's—approach would restrict FPC's authority to order interconnections with local distribution companies.

These premises are as fallacious and as baseless as FPC's decision herein.

a. The State of California has a highly specialized staff, at least equal to that of FPC.

b. It is not true that a state commission cannot effectively assure that local distribution companies[12] and hence the ultimate consumers within the state receive their fair share of the cost savings made possible by advancing technology and interstate integration.

While California could not order production of books and records of an out-of-state pool member, neither can FPC order production of books and papers of present or prospective Canadian pool members of the Canadian-United States-Eastern (Canuse) interconnections. Both California and FPC can, nevertheless, get the information they will need by requiring the pool members which are within their respective jurisdictions to sustain their burden of proving the reasonableness of existing or proposed rates. A member of a pool, in order to sustain that burden, would have to produce proof that it was receiving its fair share of such cost savings by producing proof of its costs, and if this requires production of pool data, California, for one, has the authority, the means and the determination to get such data.

c. California must assume that FPC will use reasonable methods for the determination of costs of power pool members and require an adequate and continuing reporting system of the operation of the methods used and benefits experienced by them. If it

[12]See footnote 8, p. 28, supra.

does so, California can see no reason why it or any other State commission cannot rely upon the determination of such costs by FPC until found by FPC to be unreasonable, or why the latter should permit its "cost determinations" to "become outdated." (FPC Br. p. 38.)

It is true that the operation of a power pool is fluid and will vary, not only from day to day but from minute to minute, as utilities interchange power which they do not need in their own operations.[13] Certainly FPC would not fix rates for resale of firm power, such as Edison sells to Colton on a day to day basis. Its argument confuses costs with rates. Costs of everything a utility uses may vary from day to day; rates must not. Rates are made prospectively, generally from past experienced costs extrapolated into estimated costs for the future.

Irrespective of the foregoing considerations, the "pool costs" argument does not weigh heavily enough in the ratemaking process to oust the states of jurisdiction. As pools presently operate, at least, benefits and offsetting costs resulting from pool membership are relatively minor when considered in relation to the total revenues and expenses of a pool member.

d. If some states do not regulate sales for resale, that is quite irrelevant to the issues here. California does regulate such sales, and respectfully suggests

[13]Variations in use will not present any particular difficulty in California or on the West Coast, if such a pool should be formed, because all the electric utilities are in the same time zone and all experience roughly the same daily and seasonal peaks.

that if consumers in other states need similar regulatory protection it is for them and their legislatures to act upon their need.

e. California's—and Edison's—approach would not restrict FPC's authority to order interconnections with local distribution companies. Congress has already restricted it. (Section 202(b) (Appendix, p. ii).)

Only if a state Commission or the public utility involved applies for authorization for the connection, and only after notice to each state Commission and the utility and opportunity to be heard, may FPC by order direct the establishment of an interconnection, and then only if it can find that no undue burden would be placed on the utility; furthermore, the Commission is without authority to compel enlargement of generating facilities or to compel the utility to sell or exchange energy when to do so would impair its ability to serve its customers. If all of these "restricted and parochial" considerations (FPC Br. p. 39) are met, California cannot conceive how the application of the simple jurisdictional test would impede FPC's jurisdiction to order interconnections.

C. The Decision of the Court Below Correctly Held That Cases Relied Upon by FPC Are Distinguishable.

FPC takes the position that regardless of the Congressional intent merely to plug the Attleboro gap, it is now "far too late . . . to define [its] jurisdiction over sales at wholesale in interstate commerce on the basis of a restrictive reading" (FPC Br. p. 9) of

Public Util. Comm'n. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). It would have the Court dissociate the language of Section 201(b) regarding sales at wholesale from the rest of the Federal Power Act, ignore the intent of Congress, and embrace a whole new, broad class of sales heretofore considered subject to state and not federal regulation. Within this frame of reference it would insist that the Court is compelled to find that *all* wholesale sales of energy in interstate commerce are within FPC's jurisdiction.[14]

But, as the Court below properly found, the cases relied on are distinguishable because they involved conflicts of interest between states or must be read within the factual framework of the cases. (R. 947.)

Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co., 314 U.S. 498 (1942), concerned the right of a state to order a company operating in interstate commerce to extend a pipeline and to sell gas to another company, which it could do only if it obtained a certificate from FPC. The Court held this to be beyond the power of the state because the "extension . . . is so intimately associated with commerce *and would so affect its volume moving into the state and*

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[14]This is reminiscent of a passage from Cardozo, Growth of the Law, p. 66:

"'Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.'"

distribution among the states as to be within the Congressional power to regulate. . . . ." (Emphasis supplied.)

In *Colorado-Wyoming Gas Co. v. FPC*, 324 U.S. 626 (1944), the issue before the Court was whether FPC in fixing the gas company's rates had improperly included costs of nonjurisdictional (intrastate) operations. There a sale for resale was made in Wyoming after similar sales from the same interstate transmission line had been made in Colorado—clearly an *Attleboro* gap situation.

In *Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n.*, 332 U.S. 507 (1947), the question before the Court was whether FPC had jurisdiction to regulate sales made by an interstate pipeline company directly to industrial customers. The Court found that the state and not FPC had jurisdiction, because at the time of the passage of the Natural Gas Act the states could constitutionally regulate such sales—in other words, there was no Attleboro gap for FPC to fill. In the case at bar, because there is no conflict of interest between States, California has constitutionally regulated the sale to Colton, and there is no Attleboro gap.

Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Commission, 341 U.S. 329 (1951), also involved a state's right to regulate direct sales to industrial customers. The Court held the sales to be primarily of local interest, even though the gas was transported in interstate commerce.

In *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952), the Maryland Public Service Commission and others asked FPC to investigate and reduce excessive rates charged by Pennsylvania Water & Power Co. to Consolidated Gas Electric Light and Power Company of Baltimore so that the Maryland Commission could lower Consolidated's rates to Maryland customers. One issue concerned certain sales at wholesale made by Penn Water in Pennsylvania to Pennsylvania customers, which were held to be in interstate commerce and subject to FPC jurisdiction. These sales of interstate energy were the *first* sales at wholesale after generation and therefore were properly held subject to FPC jurisdiction. FPC is in error in its assertion that "prior sales for resale to Penn Water in that State [Pennsylvania] were also subject to Commission regulation." (Br. p. 24-25.) Pennsylvania Water & Power Co.'s Maryland subsidiary, Susquehanna Transmission Company, transported but did not sell energy to its affiliate. (*Pennsylvania Water & Power Co.*, 8 FPC 1, 98.) Pennsylvania Water & Power Co. bought energy from its affiliate Safe Harbor Water Power Company in Pennsylvania. The dissenting opinion makes clear that the Court was much concerned with "the exploitation of the public through an unholy alliance between . . . Penn Water and Consolidated," (p. 424) an arrangement that "allowed Consolidated . . . to manage Penn Water as though the latter were its alter ego." (p. 425.) When the affiliates thus are treated as one, it is apparent the first "sales" are illusory, and the sales

to the distributing companies in Pennsylvania become, in effect, the first sales in interstate commerce. These sales are Attleboro-type sales and therefore properly subject to FPC regulation.

In *United States v. Public Util. Comm'n.*, 345 U.S. 295 (1953), energy was transmitted in an unbroken line from one state for resale in another. Unlike the case at bar, it concerned attempted California regulation of the resale rate of energy to be consumed in Nevada. Here, California is regulating the resale rate of energy to be consumed in California after an initial, federally regulated sale in interstate commerce. As stated by the Court below, "The sweeping statements by the Court that § 201 left no authority in the states over interstate sales for resale must be read within the factual framework of the case." (R. 949.) Further, this Court in *United States v. Public Util. Comm'n., supra,* attempted to determine just what Congress ha din mind in preserving to the states "'matters . . . subject to regulation by the States,' §201(a) . . ." (345 U.S. at 308-309.) Mr. Justice Jackson, in his concurring opinion, stated (p. 319):

> "I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird

endeavor. That process seems to me not interpretation of a statute but creation of a statute."

Mr. Justice Frankfurter, refraining from participation, wrote (p. 321):

"It is one thing to construe a section of a comprehensive statute in the context of its general scheme, as that scheme is indicated by its terms and by the gloss of those authorized to speak for Congress, either through reports or statements on the floor. It is a very different thing to extrapolate meaning from surmises and speculation and free-wheeling utterances, especially to do so in disregard of the terms in which Congress has chosen to express its purpose."

Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), presented the question of the jurisdiction of FPC over rates charged by a natural gas producer in the sale in interstate commerce of such gas for resale to pipeline companies for consumption in states other than the state of production. In this, as in *United States v. Public Util. Comm'n., supra*, the Court was concerned with FPC's regulation of an initial sale, finding that:

"Unreasonable charges exacted at this stage of the movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of gas, including the ultimate consumer." (p. 680.)

In the case at bar, the Secretary of the Interior regulates the initial sale price, so that there cannot

be any "unreasonable charges" at this stage or perpetuated in the rate which California thereafter fixes. Further, there was actual conflict between the states in *Phillips,* unlike the case at bar in which there is no possibility of conflict, since only the state of California is interested in Edison's rates to Colton. Here, as in *United States v. Public Util. Comm'n., supra,* the sweeping language of the decision must be read within the factual framework of the case.

The only case which may be said to support FPC's assertion of jurisdiction is *Wisconsin v. Federal Power Commission,* 201 F.2d 183 (CA DC (1952) *cert. denied* 345 U.S. 934.) Although the Court relied upon *Wisconsin-Michigan Power Co. v. Federal Power Commission,* 197 F.2d 472 (1952), stating that it was "a case which arose upon strikingly similar facts", its reliance was misplaced for the facts in that case were not strikingly or otherwise or at all similar. Wisconsin-Michigan's sales for resale in the state of consumption of gas which it had transmitted from out-of-state in its own lines were not preceded by any federally regulated sale fixing rates for the imported energy. In other words, there was a clear Attleboro gap situation in Wisconsin-Michigan, and none in *Wisconsin v. FPC, supra.* Obviously, the Court erred in the latter, for in that case there was no Attleboro gap.

In *FPC v. East Ohio Gas Co.,* 338 U.S. 464 (1950), the Court upheld an FPC interpretation of the Natural Gas Act under which FPC undertook to regulate

the accounting procedures, not the rates, of a company engaged in local distribution of gas within one state. This and other decisions prompted Congress to clarify the Natural Gas Act by enacting the Hinshaw Amendment in 1954. The Congressional history leaves no doubt as to the original and continuing intent of Congress:

> " 'The purpose of this legislation is to *clarify* the Natural Gas Act by further defining the limits of Federal Power Commission's jurisdiction with respect to operations of companies engaged in the local distribution within a State of out-of-State natural gas which has been received by such a company at or within the State borders.
>
> " 'In making this clarification the *legislation reaffirms and is thoroughly consistent with the original intent of the Congress in enacting the Natural Gas Act; namely, that the act was to supplement, and not supplant State regulation. . . .*
>
> " 'The difficulty giving rise to the need for this bill is that under certain interpretations of the Federal Power Commission, principally the interpretation upheld by the Supreme Court in the East Ohio case [338 U.S. 464, 70 S.Ct. 266] the Commission has undertaken regulation of some activities of certain companies engaged in the distribution of natural gas whose operations take place wholly within a single State and which can be completely regulated by the respective States. This has resulted in unnecessary duplication of State and Federal jurisdiction, and has caused extra expense to individual companies because of overlapping requirements regarding the filing of

reports and information. This bill eliminates this duplication by leaving the jurisdiction over these companies exclusively in the States, *as always has been intended.*

"'With the elimination of this duplication the Federal Power Commission is in full accord. Indeed, the Commission in commenting favorably on the bill . . . stated:

"'No good purpose is seen for the imposition of Federal regulation in addition to that provided under State laws *where only one State is affected,* and the futility of duplication was pointed out in our Opinion No. 216, July 17, 1951 (Texas Illinois Natural Gas Pipeline Co.). At that time we expressed the hope that Congress would see fit to enact remedial legislation covering the East Ohio situation. We repeat that hope.'" (U.S. Code Congressional Administrative News, 83rd Congress, 2d Session, 1954, Vol. 2, p. 2102.) (Emphasis supplied.)

With the exception of *Wisconsin v. FPC, supra,* which obviously was decided incorrectly by the Court of Appeals, no case cited by petitioners supports the view that all wholesales are within the regulatory purview of FPC. Every case decided by this Court involved an *Attleboro* situation. The sweeping statements contained therein which would seem to conclude that FPC has jurisdiction over all wholesale sales go beyond the facts before the Court.

Statements in this Court's decisions construing the intent of Congress can scarcely be said to be persuasive now.

There was no such declaration of intent in the Natural Gas Act as is found in the Federal Power Act, yet the Court in *FPC v. Arizona Edison Co.*, 194 F.2d 679, 682 (1952), found that the legislative history of both acts indicated the desire of Congress to regulate only those activities which were not subject to regulation by the states, and not to impinge upon areas open to the exercise of state powers. The vigorous clarification of Congressional intent in the Hinshaw Amendment supplied the omission in the Natural Gas Act. The Congressional intent being to do no more than to fill the *Attleboro* gap in promulgating both acts, and the Hinshaw Amendment having clarified that intent with relation to the Natural Gas Act, California respectfully submits that it would seem appropriate to construe the Federal Power Act in the light of the Hinshaw Amendment to the Natural Gas Act. Since decisions of the Court in *East Ohio Gas* and other cases would have been otherwise had the Congressional intent been known, California urges a reevaluation of the decisions prior to the Hinshaw Amendment with a view toward determining their present applicability to the case at bar.

Even if subsequent legislation which declares the intent of an earlier law is not conclusive in determining what the previous Congress meant, the later law is entitled to great weight when it comes to the problem of construction. (*FHA v. The Darlington*, 358 U.S. 84 (1958).)

Wherefore, the Public Utilities Commission of the State of California prays that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

Dated: October 14, 1963.

RICHARD E. TUTTLE,
Chief Counsel,
J. THOMASON PHELPS,
Principal Counsel,
MARY MORAN PAJALICH,
Principal Counsel.

(Appendix Follows)

Appendix

RELEVANT PARTS OF STATUTES INVOLVED

1. The relevant parts of the Federal Power Act (Act of June 10, 1920, c. 285, 41 Stat. 1063, as amended Aug. 26, 1935, c. 687, 49 Stat. 863, 16 U.S.C. 791a-825r (1958)) involved in this proceeding are as follows:

> Section 201 (a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in sections 824-825r of this title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.
>
> (b) The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as

specifically provided in said sections, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of sections 824-824h of this title, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in sections 824-824h of this title, means a sale of electric energy to any person for resale. [49 Stat. 847, 16 U.S.C. § 824].

* * *

Section 202 (b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to

compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them. [49 Stat. 487, 16 U.S.C. § 824a(b)].

Section 205 (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [49 Stat. 851, 16 U.S.C. § 824d(a)].

2. The relevant parts of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821-833, 15 U.S.C. §§ 717-717w (1958)) involved in this proceeding are as follows:

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provision of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [15 U.S.C. § 717].